Steven BASTIEN, Plaintiff-Appellant,
v.
AT&T WIRELESS SERVICES, INC., Defendant-Appellee.

No. 99-2127.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 9, 1999

Decided March 6, 2000

Dissatisfied customer sued cellular telephone services provider in state court for breach of contract and consumer fraud. After provider removed action, customer moved to remand for lack of federal subject matter jurisdiction and provider moved to dismiss for failure to state claim. The United States District Court for the Northern District of Illinois, Charles P. Kocoras, J., 1999 WL 259939, granted provider's motion and denied customer's motion. Customer appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1) statute completely preempted regulation of mobile telecommunications rates and market entry, and (2) customer's claims, although cast in state law terms, fell within area specifically reserved to federal regulation and were not protected from removal by well-pleaded complaint rule.

Affirmed.

[1] REMOVAL OF CASES ⚖107(9)
334k107(9)
In challenging denial of remand motion, plaintiff waived issue of whether complaint was properly dismissed for failure to state claim when he failed to brief or argue dismissal on appeal. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] REMOVAL OF CASES ⚖25(1)
334k25(1)
A plaintiff is a master of his own complaint and may seek to avoid federal jurisdiction by pleading only state law claims, but when that complaint, fairly read, states a federal question, the defendant may remove the case to federal court. 28 U.S.C.A. § 1441(a, b).

[3] REMOVAL OF CASES ⚖25(1)
334k25(1)
Although federal preemption normally would constitute a federal defense to a state law action, and therefore would not support removal from state court, in some instances Congress has so completely preempted a particular area that no room remains for any state regulation and the complaint would be necessarily federal in character; in that situation, removal is proper despite the well- pleaded complaint rule.

[3] STATES ⚖18.7
360k18.7
Although federal preemption normally would constitute a federal defense to a state law action, and therefore would not support removal from state court, in some instances Congress has so completely preempted a particular area that no room remains for any state regulation and the complaint would be necessarily federal in character; in that situation, removal is proper despite the well- pleaded complaint rule.

[4] REMOVAL OF CASES ⚖25(1)
334k25(1)
Statute providing that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service" completely preempted the regulation of mobile telecommunications rates and market entry, allowing removal of pertinent claims to federal court, although savings clause continues to allow state-court claims that do not touch on the areas of rates or market entry. Communications Act of 1934, § 332(c)(3), as amended, 47 U.S.C.A. § 332(c)(3).

[4] STATES ⚖18.81
360k18.81
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[4] TELECOMMUNICATIONS ⚖461.5

372k461.5
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[5] REMOVAL OF CASES ⚿107(9)
334k107(9)
In evaluating propriety of removal, Court of Appeals will not be bound by the names and labels placed on a complaint by the plaintiff when that complaint in fact raises a federal question.

[6] REMOVAL OF CASES ⚿107(9)
334k107(9)
Court of Appeals reviews de novo the denial of motion for remand of removed action, which challenges the subject matter jurisdiction of the federal district court. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[7] REMOVAL OF CASES ⚿25(1)
334k25(1)
Customer directly attacked rates of cellular telephone services provider and its right to enter particular market when he alleged that provider signed up subscribers without building infrastructure necessary to provide reliable cellular connections and did so knowing it could not deliver promised services, and relief would necessarily force provider to do more than required by Federal Communications Commission (FCC); therefore claims, although cast as state law fraud and breach of contract claims, fell within area specifically reserved to federal regulation and were not protected from removal by well-pleaded complaint rule. Communications Act of 1934, §§ 332(c)(3), 414, as amended, 47 U.S.C.A. §§ 332(c)(3), 414.

[7] STATES ⚿18.81
360k18.81
Customer directly attacked rates of cellular telephone services provider and its right to enter particular market when he alleged that provider signed up subscribers without building infrastructure necessary to provide reliable cellular connections and did so knowing it could not deliver promised services, and relief would necessarily force provider to do more than required by Federal Communications Commission (FCC); therefore claims, although cast as state law fraud and breach of contract claims, fell within area specifically reserved to federal regulation and were not protected from removal by well-pleaded complaint rule. Communications Act of 1934, §§ 332(c)(3), 414, as amended, 47 U.S.C.A. §§ 332(c)(3), 414.

[7] TELECOMMUNICATIONS ⚿461.5
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[8] FEDERAL CIVIL PROCEDURE ⚿1832
170Ak1832
On a motion to dismiss for lack of subject matter jurisdiction, the court is not bound to accept the truth of the allegations in the complaint, but may look beyond the complaint and the pleadings to evidence that calls the court's jurisdiction into doubt. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

[8] FEDERAL CIVIL PROCEDURE ⚿1835
170Ak1835
On a motion to dismiss for lack of subject matter jurisdiction, the court is not bound to accept the truth of the allegations in the complaint, but may look beyond the complaint and the pleadings to evidence that calls the court's jurisdiction into doubt. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

***984** Daniel A. Edelman, Cathleen M. Combs (argued), Edelman, Combs & Latturner, Chicago, IL, for Plaintiff-Appellant.

Fay Clayton (argued), Robinson, Curley & Clayton, Chicago, IL, for Defendant- Appellee.

Before BAUER, EASTERBROOK and KANNE, Circuit Judges.

KANNE, Circuit Judge.

Steven Bastien sued AT&T Wireless Services, Inc. in an Illinois court over his allegations that the company misled him about his cellular telephone service. Congress has decreed that suits related to rates and service of telephone companies be handled in federal court, and despite Bastien's best efforts at crafting a state-law complaint, AT&T Wireless exercised its right to have Bastien's case removed to federal court. Bastien challenged the removal order and the jurisdiction of the federal district court to hear what he contended were state law matters. Because we read Bastien's complaint to challenge only AT&T Wireless's rates and right to enter the market on the terms specified by the FCC, we affirm the district court's ruling and hold that jurisdiction over Bastien's complaint belongs exclusively to the federal courts.

I. HISTORY

Until recently, the Chicago wireless telephone market consisted of Ameritech and Southwestern Bell (Cellular One). AT&T Wireless, a subsidiary of AT&T, entered the market in the late 1990s, after receiving approval of its rates and infrastructure arrangements from the Federal Communications Commission, as required by federal law. See 47 C.F.R. § 24.1 et seq. To encourage new market entrants, the FCC allows service providers to begin operations in an area before it has fully built out its network. For this reason, the service provided by AT&T Wireless in 1998 was far from flawless.

***985** In 1998, Bastien signed up as an AT&T Wireless customer, although his complaint, filed in state court in Cook County, provided no information regarding the terms and conditions of his service agreement with AT&T Wireless. He quickly became dissatisfied with the quality of service. Because of the insufficient coverage provided by AT&T Wireless's network and also because of the inherent difficulties and unreliability of wireless service generally, many of Bastien's calls were "dropped," that is, cut off in mid- call. Dropped calls occur because of interference to the radio wave carrying the call, such as from tunnels, buildings and the rare Midwestern hill. A more fully developed infrastructure would lose fewer calls because there would be less chance of interference.

Upset about the number of dropped calls, Bastien complained to AT&T Wireless and was told that he could get refunds either automatically by redialing the dropped call within sixty seconds, or by later calling a customer representative and having a credit applied to his bill. Bastien took full advantage of both options, although he often was unable to get the automatic rebate by redialing since a source of interference that interrupts a call may prevent re-connection for longer than sixty seconds. Unhappy that the automatic credit option did not always work, Bastien complained to the FCC, but was told that AT&T Wireless was in full compliance with all FCC rules.

Bastien then filed suit in Illinois state court, alleging that AT&T Wireless breached its contract with him and committed consumer fraud. In the complaint, Bastien alleged that:

> 9. AT&T Wireless signed up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular connections.
> 10. As a result, a large proportion of attempts to place calls on AT&T Wireless' system are unsuccessful.
> 11. AT&T Wireless nevertheless continued marketing and selling its telephones and telephone service, without regard to the fact that it knew that it could not deliver what it was promising.
>
> . . . . .
>
> 23. By signing up subscribers without first building the cellular towers and other infrastructure necessary to accommodate good cellular connections to such subscribers, with the result that a large proportion of attempts to place calls on AT&T Wireless' system are unsuccessful, AT&T Wireless violated:
> a. Its contracts; and
> b. The implied duty of good faith and fair dealing under such contracts.
>
> . . . . .
>
> 25. AT&T Wireless violated § 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2 by

committing unfair acts or practices as follows:
a. Signing up subscribers without first building the cellular towers and other infrastructure necessary to accommodate good cellular communications to such subscribers, with the result that a large proportion of attempts to place calls on AT&T Wireless' system are unsuccessful;
b. Misrepresenting the quality and benefits of its products and services;
c. Concealing the material facts that it did not have the capacity to handle the volume of its cellular calls; and
d. Failing to have appropriate means for crediting customers for incomplete calls.
26. AT&T Wireless knew that it was signing up subscribers without first building the cellular towers and other infrastructure necessary to handle the call range reasonably expected to be used by such subscribers, and that a large proportion of attempts to place calls on AT&T Wireless' system would be unsuccessful.

AT&T Wireless removed the case pursuant to 28 U.S.C. § 1441(b) on the ground that Congress had expressly preempted ***986** regulation of rates and market entry for mobile telephone service in the amendments to the Federal Communications Act of 1934, 47 U.S.C. § 332(c)(3)(A). That section states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." Id. With this preemption clause in mind, Bastien diligently attempted to state his claim in terms of Illinois state law actions. However, AT&T Wireless contended that Bastien's complaint in fact challenged AT&T Wireless's rates and right to enter the market, two subjects specifically granted to the primary jurisdiction of the FCC.

[1] Bastien moved under Rule 12(b)(1) to remand the case to Illinois state court for lack of federal subject-matter jurisdiction, and AT&T Wireless moved for dismissal of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. Because the federal statute completely preempted the stated actions, Judge Charles P. Kocoras denied Bastien's 12(b)(1) motion and granted AT&T Wireless's motion to dismiss. Bastien appealed the denial of the 12(b)(1) motion to remand the case to state court. On appeal, he did not brief or argue the Rule 12(b)(6) dismissal so that issue is deemed waived. See Sere v. Board of Trustees, 852 F.2d 285, 287 (7th Cir.1988). [FN1]

FN1. Bastien has indicated that he "want[s] to stand or fall on [his] claim that this is really a suit under state law," and we therefore do not need to address the doctrine of primary jurisdiction and whether the case should be directed to the FCC or retained by the federal district court.

II. ANALYSIS

Bastien contends that his complaint properly set out two claims under Illinois law--breach of contract and consumer fraud--that were distinct from the rates and market entry claims specifically reserved for the FCC. As such, Bastien believes that the federal district court did not have jurisdiction to hear his case, and the doctrine of primary jurisdiction, which ordinarily would refer the case to the administrative agency, did not apply. If Bastien's complaint in fact raises regulatory issues preempted by Congress, then the claims would fail as a matter of law since they are couched in terms of two state law actions. In that case, Bastien's suit properly would be dismissed.

[2][3] It is true that a plaintiff is a master of his own complaint and may seek to avoid federal jurisdiction by pleading only state law claims, see Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); Taylor v. Anderson, 234 U.S. 74, 75-76, 34 S.Ct. 724, 58 L.Ed. 1218 (1914); Lister v. Stark, 890 F.2d 941, 943 (7th Cir.1989), but when that complaint, fairly read, states a federal question, the defendant may remove the case to federal court. See 28 U.S.C. § 1441(a)-(b); Burda v. M. Ecker Co., 954 F.2d 434, 438 (7th Cir.1992) (holding that court may look beyond face of the complaint to determine if plaintiff "artfully pleaded" matters under state law that actually raise a federal question). Federal preemption normally would constitute a federal defense to a state law action, and therefore would not support removal from state court. See Gully v. First Nat'l Bank, 299 U.S. 109, 113, 57 S.Ct. 96, 81 L.Ed. 70, (1936). However, in some instances, Congress has so completely preempted a particular area that no room remains for any state regulation and the complaint would be "necessarily federal in

character." See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). In that situation, removal is proper despite the well- pleaded complaint rule. See id.

[4][5][6] There can be no doubt that Congress intended complete preemption when it said "no State or local government shall *987 have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3) (emphasis added). This clause completely preempted the regulation of rates and market entry, allowing removal to federal court, although the savings clause continues to allow claims that do not touch on the areas of rates or market entry. Therefore, Bastien's attempt to use the "well-pleaded complaint" rule to shield himself from federal court jurisdiction would be unavailing if his complaint in fact challenges rates or market entry. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); Metropolitan Life, 481 U.S. at 65-66, 107 S.Ct. 1542 (holding that a purported state law claim that involves areas preempted by federal law must be recharacterized as a federal claim); Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1075 (7th Cir.1992). We will not be bound by the names and labels placed on a complaint by the plaintiff when that complaint in fact raises a federal question. See Burda, 954 F.2d at 438. The issue is whether Bastien's complaint, however denominated, actually challenges AT&T Wireless's rates or market entry. We review de novo the denial of the 12(b)(1) motion, which challenges the subject matter jurisdiction of the federal district court. See Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856, 862 (7th Cir.1996); see also Selbe v. United States, 130 F.3d 1265, 1266 (7th Cir.1997).

A. Preemption and the Savings Clause

This case asks us to resolve an ambiguity between two statutory clauses. First, the preemption clause states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). Second, Congress passed a "savings clause" to the Federal Communications Act which provided,"Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414.

At first blush, the savings clause appears to encompass most actions, but it is well established that such cannot be true. To read the clause expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create. See AT&T Co. v. Central Office Telephone, Inc., 524 U.S. 214, 228, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) ("[T]he act cannot be held to destroy itself.")(citation omitted); Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir.1998). Therefore, we have read the savings clause narrowly to avoid swallowing the rule, but not so narrowly as to render it a dead letter. Although most complaints will involve rates or other issues specially reserved to federal control, we have recognized before that some claims do not and may be addressed in state court. See Cahnmann, 133 F.3d at 488 (citing In re Long Distance Telecommunications Litig., 831 F.2d 627, 633-34 (6th Cir.1987)[hereinafter Long Distance Litigation]).

The two clauses read together create separate spheres of responsibility, one exclusively federal and the other allowing concurrent state and federal regulation. Cases that involve "the entry of or the rates charged by any commercial mobile service or any private mobile service" are the province of federal regulators and courts. 47 U.S.C. § 332(c)(3)(A). The states remain free to regulate "other terms and conditions" of mobile telephone service. Id. The district court aptly characterized the phrase "other terms and conditions" as "somewhat enigmatic," and we agree, but the court's review of the legislative history regarding the meaning of this phrase was unnecessary and not particularly authoritative since it reflected only the views of one chamber of Congress. See Board of Trade v. SEC, 187 F.3d 713, *988 720 (7th Cir.1999)("Legislative history is problematic under the best circumstances, and even so reliable a source as the Conference Committee Report may be used only when there is a genuine ambiguity in the statute.").

Furthermore, this case does not demand so nuanced

a study of the phrase "other terms and conditions" because the meaning of "entry of or the rates charged by any commercial mobile service" adequately resolves the issue here. In practice, most consumer complaints will involve the rates charged by telephone companies or their quality of service. See Central Office Telephone, 524 U.S. at 223, 118 S.Ct. 1956 ("Any claim for excessive rates can be couched as a claim for inadequate services and vice versa."). As the Supreme Court recognized in Central Office Telephone, a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law. Id. In addition to rates and service, federal regulations expressly dictate the terms under which a provider may enter a new market. The act makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure. See, e.g., 47 C.F.R. §§ 24.103(geographic and population coverage requirements), 24.132 (narrowband antenna power and height requirements), 24.232 (broadband antenna power and height requirements). Congress has expressed its decision that these areas be reserved exclusively for federal adjudication, a point that Bastien does not contest.

A review of two cases addressing the divide between the state and federal spheres will illustrate the point. First, in Cahnmann, this court held that a putative breach of contract claim filed against long-distance carrier Sprint Corp. belonged in federal court because the effect of the challenge would be to invalidate a tariff approved by the FCC. Cahnmann, 133 F.3d at 489. In the world of telephone regulation, a tariff is a proposal filed by the carrier with the FCC setting out the rates and conditions at which it intends to offer service to the public. Once approved by the FCC, the carrier may not depart from its terms. Sprint, the defendant in Cahnmann, had initially filed a tariff offering customers "Fridays Free" long-distance service. Id. at 486. The tariff was approved, and Sprint marketed the deal to small business customers. For a variety of reasons, Sprint filed a second, amended tariff a few months later, changing the terms of the first tariff. The FCC approved the amended tariff, and shortly afterward, a consumer class action was filed alleging that Sprint breached its contract with customers who signed up under the first tariff. Although the claim intended to sound in state contract law, we held that a direct challenge to the legitimacy of an approved tariff must be litigated through the federal system. See Cahnmann, 133 F.3d at 490-91. We refused to read the savings clause to nullify the provisions of the Communications Act, despite the clause's admittedly expansive wording. See id. at 488; see also Central Office Telephone, 524 U.S. at 228, 118 S.Ct. 1956.

While instructive, Cahnmann addressed a different type of claim than the one at issue here. The plaintiffs in Cahnmann wielded state law weapons in a facial attack on an approved tariff. The plaintiff here, Bastien, does not dispute AT&T Wireless's compliance with the FCC rules or the validity of those rules, but attempts to use state law as a means of attacking wrongs that he believes are not covered by the preemption clause. If that were true, it would fall within the ambit of the savings clause.

A similar situation arose in the Long Distance Litigation, 831 F.2d at 633- 34, which we noted in Cahnmann, 133 F.3d at 488. In that Sixth Circuit case, the plaintiffs accused the long-distance companies of state law fraud and deceit for failing to tell customers of their practice of charging for uncompleted calls. Long Distance Litigation, 831 F.2d at 633. The court reasoned that the purpose of the preemption ***989** clause to achieve nationwide uniformity in telecommunications regulation was not at issue in a case challenging fraudulent and deceitful statements by the telephone service providers. Id. Because the claims for fraud and deceit would not have affected the federal regulation of the carriers at all, the court held that Congress could not have intended to preempt the claims.

B. Bastien's Complaint

[7] We do not need to go so far as to divine the intention of Congress to see that Bastien's complaint directly attacks AT&T Wireless's rates and its right to enter the Chicago market and therefore can be distinguished from the Long Distance Litigation. We merely need to look at the face of the complaint and ask what the nature of the claims are and what the effect of granting the relief requested would be. This shows that, in sharp contrast to the Long Distance Litigation, Bastien's complaint would directly alter the federal regulation of tower construction, location and coverage, quality of

service and hence rates for service. In Paragraph 9, Bastien alleges that AT&T Wireless "signed up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular connections." In Paragraph 11, AT&T Wireless "nevertheless continued marketing and selling its telephones and telephone service." In Paragraph 23, AT&T Wireless allegedly "sign[ed] up subscribers without first building the cellular towers and other infrastructure necessary to accommodate good cellular connections." In Paragraph 25(a), AT&T Wireless "sign[ed] up subscribers without first building the cellular towers and other infrastructure necessary to accommodate good cellular connections to such subscribers." In Paragraph 26, AT&T Wireless "knew that it was signing up subscribers without first building the cellular towers and other infrastructure necessary to handle the call range reasonably expected to be used such subscribers."

These claims tread directly on the very areas reserved to the FCC: the modes and conditions under which AT&T Wireless may begin offering service in the Chicago market. The statute makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure, as well as the rates and conditions that can be offered for the new service. Should the state court vindicate Bastien's claim, the relief granted would necessarily force AT&T Wireless to do more than required by the FCC: to provide more towers, clearer signals or lower rates. The statute specifically insulates these FCC decisions from state court review.

Bastien's complaint contains other allegations sounding more like state law claims. For instance, in Paragraph 9, AT&T Wireless allegedly "knew that it could not deliver what it was promising." In Paragraph 23, AT&T Wireless violated: "a) Its contracts; and b) The implied duty of good faith and fair dealing under such contracts." In Paragraph 25, AT&T Wireless allegedly "b) [m]isrepresented the quality and benefits of its products and services; c) [concealed] the material facts that it did not have the capacity to handle the volume of its cellular calls." While these charges appear more like traditional state law claims, they are all founded on the fact that AT&T Wireless had not built more towers and more fully developed its network at the time Bastien tried to use the system. The reason AT&T Wireless had not more fully developed its network was because it was in compliance with the FCC schedule for building towers and establishing service in the Chicago market. In this complaint, Bastien has repackaged challenges to the FCC-approved plan in a state law wrapper, but the contents of that package remain challenges to the FCC approved plan.

[8] An indication of Bastien's transparent attempt to recast federal claims as state law fraud and breach of contract actions can be seen in the complete absence of any details in the pleading regarding the particular promises or representations ***990** made by AT&T Wireless. Normally we do not scrutinize a complaint so closely because under our system of notice pleading, we set a very low threshold to determine whether a complaint states a claim upon which relief can be granted. See Jackson v. Marion County, 66 F.3d 151, 153-54 (7th Cir.1995). Such is not the case when a complaint is challenged for want of jurisdiction. On a motion to dismiss under Rule 12(b)(1), the court is not bound to accept the truth of the allegations in the complaint, but may look beyond the complaint and the pleadings to evidence that calls the court's jurisdiction into doubt. Commodity Trend Service, Inc. v. Commodity Futures Trading Commission, 149 F.3d 679, 685 (7th Cir.1998); Aquafaith Shipping, Ltd. v. Jarillas, 963 F.2d 806, 808 (5th Cir.1992). Scrutinizing Bastien's complaint more closely, we note that the complaint alleges "misrepresentation" and "concealing" but does not offer specific instances of the words used by AT&T Wireless that would qualify as such. Rather we are left with facts suggesting AT&T Wireless had not sufficiently built up its network and the bare conclusory allegation that this constituted misrepresentation and fraud. That is not adequate to earn the plaintiff the protection of the well-pleaded complaint rule.

III. CONCLUSION

Bastien's complaint, although fashioned in terms of state law actions, actually challenges the rates and level of service offered by AT&T Wireless, an area specifically reserved to federal regulation. The district court was correct in removing the case from state court and denying Bastien's motion to dismiss and remand the case under Rule 12(b)(1). Because Bastien did not appeal the grant of AT&T Wireless's motion to dismiss for failure to state a claim, the

order of the district court dismissing the complaint is AFFIRMED.

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Court of Appeal, Third District, California.

Susanne BALL et al., Plaintiffs and Appellants,
v.
GTE MOBILNET OF CALIFORNIA et al., Defendants and Respondents.

No. C031783.

June 8, 2000.

Customers sued every major provider and owner of cellular phone services and related wireless personal communication services in the State, asserting that requiring them to pay for non-communication time violated State law on unfair and unlawful business practices. The Superior Court, County of Sacramento, No.98AS03811, John R. Lewis, J., sustained the defendants' demurrer, and customers appealed. The Court of Appeal, Davis, J., held that: (1) claims for injunctive relief against defendants' billing for non-communication time were preempted by a provision of the federal Communications Act as to the period after that provision's effective date, but not before the effective date, and (2) claims of inadequate disclosure or misrepresentation were not preempted.

Reversed.

West Headnotes

[1] Pleading ⚖189

General demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations.

[2] Appeal and Error ⚖863

When a demurrer is sustained without leave to amend, appellate court determines whether there is a reasonable possibility that a cause of action can be stated: if it can be, appellate court reverses; if not, appellate court affirms.

[3] Pleading ⚖193(2)

Demurrer is an appropriate vehicle to secure a dismissal of a state law action based on federal law preemption.

[4] States ⚖18.3

Federal law preemption is based on the Supremacy Clause of the federal Constitution, and may be demonstrated by the explicit language of a federal statute, by an actual conflict between state and federal law, or by a federal law exclusively occupying the legislative field. U.S.C.A. Const. Art. 6, cl. 2.

[5] States ⚖18.81

[5] Telecommunications ⚖461.5

Claims that providers of cellular and related wireless communication services violated State laws against unfair or unlawful business practices by billing for non-communication time were preempted by the federal Communications Act section denying State or local governments authority to regulate rates charged by commercial mobile services, insofar as the claims related to the period after that section's effective date in the State; the claims, which sought injunctive relief, challenged the reasonableness of the rates charged, attacking the reasonableness of the method by which the length, and thus the cost, of a cellular phone call was calculated. Communications Act of 1934, § 332(c)(3)(A), as amended, 47 U.S.C.A. § 332(c)(3)(A); West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

[6] Telecommunications ⚖461.5

Savings clause in the Communications Act, stating that nothing in the chapter abridged or altered remedies existing at common law or by statute, did not supersede the section denying State or local governments authority to regulate rates charged by commercial mobile services. Communications Act of 1934, §§ 332(c)(3)(A), 414, as amended, 47 U.S.C.A. §§ 332(c)(3)(A), 414.

[7] Statutes ⚖194

General remedies saving clause cannot be allowed to supersede a specific substantive pre-emption provision; this would render the preemption provision meaningless.

[8] States ⚖18.81

[8] Telecommunications ⚿461.5

Claims that providers of cellular and related wireless communication services violated State laws against unfair or unlawful business practices by billing for non-communication time were not preempted by the federal Communications Act section denying State or local governments authority to regulate rates charged by commercial mobile services, insofar as the claims related to the period prior to that section's effective date in the State; the State could regulate cellular rates in certain ways prior to the section's effective date. Communications Act of 1934, § 332(c)(3)(A), as amended, 47 U.S.C.A. § 332(c)(3)(A); West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

[9] States ⚿18.81

[9] Telecommunications ⚿461.5

Federal Communications Act section prohibiting a state from regulating "the entry of or the rates charged by" any cellular service, but allowing a state to regulate "the other terms and conditions," including "customer billing information" and "other consumer protection matters," did not preempt customers' claims that providers of cellular and related wireless communication services concealed, inadequately disclosed or misrepresented the charges for non-communication time, in violation of State laws against unfair or unlawful business practices. Communications Act of 1934, § 332(c)(3)(A), as amended, 47 U.S.C.A. § 332(c)(3)(A); West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

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DAVIS, J.

Recognizing the rapid growth of the cellular phone industry and related wireless communication methods (termed "commercial mobile radio services (CMRS)", or "commercial mobile services"), the United States Congress in 1993 amended the Communications Act of 1934. (47 U.S.C. §§ 151 et seq.; Omnibus Budget Reconciliation Act of 1993, Pub.L. 103-66, § 6002, 107 Stat. 312, 387-97 (1993); see In re Comcast Cellular Telecom. Litigation (E.D.Pa.1996) 949 F.Supp. 1193, 1197 (Comcast Cellular).) Pursuant to its stated goals of deregulating CMRS while providing a basic federal regulatory framework, Congress amended section 332 of the Communications Act to provide:

"[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any

private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." (47 U.S.C. § 332(c)(3)(A) (hereafter, § 332(c)(3)(A)), italics added; see Comcast Cellular, supra, 949 F.Supp. at p. 1197.)

The plaintiffs here have sued every major provider and owner of cellular phone services and related wireless personal communication services in California (for simplicity, we will refer to these entities and services specifically as defendants and generically as cellular providers or cellular services). Basically, plaintiffs object to having to pay for non-communication time when using these services (essentially, non-talking time, including "rounding-up" to the next full minute); they ground their objection in California's law on unfair and unlawful business practices. (Bus. & Prof.Code, § 17200 et seq.) The trial court sustained the defendants' demurrer without leave to amend and entered a judgment of dismissal, concluding that section 332(c)(3)(A) preempted these state law claims.

We conclude that plaintiffs cannot invoke state law to complain of having to pay non-communication time after August 7, 1995; this is because section 332(c)(3)(A)'s preemptive force became effective in California on August 8, 1995, and such a complaint would involve the state in regulating "the rates charged." However, plaintiffs can invoke state law to complain that such charges, before and after August 8, 1995, were not disclosed; this is because such ***804** disclosure is a "term and condition" over which the state can exercise its laws. Plaintiffs can also claim that defendants violated their pre-August 8, 1995 tariffs on file with the California Public Utilities Commission (PUC). Accordingly, we reverse the judgment of dismissal.

BACKGROUND

Before 1993, the regulation of cellular services was divided between federal and state authorities, largely along an interstate/intrastate line. (See former 47 U.S.C. § 152(b); 47 U.S.C. § 201; Kennedy and Purcell, Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong" (1998) 50 Federal Communications L.J. 547, 555-561 (hereafter, Kennedy and Purcell, Section 332, 50 Federal Communications L.J.). For example, the PUC had the power to review certain cellular rates that were filed with it in a tariff, under a "just and reasonable" standard. (See e.g., Pub. Util.Code, § 728.)

By enacting section 332(c)(3)(A) in 1993, Congress "dramatically revise[d] the regulation of the wireless telecommunications industry, of which cellular telephone service is a part." (Conn. Dept. of Public Utility Cont. v. F.C.C. (2d Cir.1996) 78 F.3d 842, 845; see Kennedy and Purcell, Section 332, 50 Federal Communications L.J. at pp. 555-565.) "To foster the growth and development of mobile services [i.e., cellular and related mobile wireless communications] that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) ... preempt[s] state rate and entry regulation of all commercial mobile services," but permits state regulation of "other terms and conditions." (H.R.Rep. No. 103-111, at p. 260, reprinted in 1993 U.S.C.C.A.N. 378, 587 (hereafter, H.R.Rep. No. 103-111, with page numbers from 1993 U.S.C.C.A.N.); § 332.) These "other terms and conditions," notes this House Report, include "such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority." (H.R.Rep. No. 103-111, p. 588; see also Tenore v. AT & T Wireless SVCS (1998) 136 Wash.2d 322, 962 P.2d 104, 111 (Tenore); GTE Mobilnet of Ohio v. Johnson (6th Cir.1997) 111 F.3d 469, 477-478.)

The trial court sustained the defendants' demurrer without leave to amend "on the ground the Federal Communications Act [§ 332(c)(3)(A)] preempts all state regulatory authority over wireless service rates." [FN1]

> FN1. All defendants joined in the demurrer filed by the Los Angeles Cellular Telephone Company. This demurrer was based solely on the ground of section 332(c)(3)(A) preemption. Los Angeles Cellular was not named as a defendant in the plaintiffs' fifth and sixth causes of action. The defendants named in those counts filed a separate demurrer that expressly adopted Los Angeles

Cellular's arguments in support of its demurrer.

DISCUSSION

1. Standard of Review

[1][2] A general demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations. (Amarel v. Connell (1988) 202 Cal.App.3d 137, 140, 248 Cal.Rptr. 276.) When a demurrer is sustained without leave to amend, we determine whether there is a reasonable possibility that a cause of action can be stated: if it can be, we reverse; if not, we affirm. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.)

[3][4] A demurrer is an appropriate vehicle to secure a dismissal of a state law ***805** action based on federal law preemption. (See Smiley v. Citibank (1995) 11 Cal.4th 138, 164, 44 Cal.Rptr.2d 441, 900 P.2d 690; Sanderson, Thompson, Ratledge & Zimny v. AWACS (D.Del.1997) 958 F.Supp. 947, 957 (Sanderson).) Federal law preemption is based on the Supremacy Clause of the federal Constitution, and may be demonstrated by the explicit language of a federal statute, by an actual conflict between state and federal law, or by a federal law exclusively occupying the "legislative field." (U.S. Const., art VI, cl. 2; Smiley, supra, at p. 147, 44 Cal.Rptr.2d 441, 900 P.2d 690; Sanderson, supra, at p. 957.) The preemption alleged here is based on the explicit language of section 332(c)(3)(A).

2. The Plaintiffs' Challenges to Paying for Non-Communication Time

The plaintiffs' complaint identifies five items of non-communication time that are billed in alleged violation of Business and Professions Code section 17200's prohibition on unfair or unlawful business practices. The five are:

--charging in full-minute billing increments (what the plaintiffs call "rounding up"), in which a full minute of wireless service is charged for each part of a minute used (the first cause of action alleges this is an unfair business practice; the second cause of action alleges it is an unlawful business practice);

--charging from connection to disconnection (what the plaintiffs term the "send" to "end" measurement--pressing the send and end buttons starts and ends the charging; the third cause of action alleges this as an unfair business practice, the fourth cause of action as unlawful);

--charging for ringing time for completed calls, while not charging for ringing time for uncompleted calls (the fifth cause of action alleges this as an unfair business practice, the sixth cause of action as unlawful; this claim was not asserted against Los Angeles Cellular);

--charging full rates for "incomplete calls" in the Los Angeles area for "bucket plans" in violation of PUC-filed tariffs; a "bucket plan" gives a customer a certain number of minutes of use per month; the seventh cause of action alleges this is an unlawful business practice);

--charging for the time it takes for the system to disconnect at the telephone company's facilities after a conversation is concluded (what the plaintiffs term the "lag time"; the eighth cause of action alleges this as an unlawful business practice, the ninth cause of action as unfair).

In each of these causes of action, plaintiffs seek "restitution of all amounts overpaid by [them] and other members of the general public ... as a result of the aforesaid unfair business act or practice." They also seek, in each cause of action, a permanent injunction enjoining defendants from engaging in any of these unfair or unlawful business practices.

[5] The plaintiffs argue that these claims are subject to state law as mere "billing practices." The defendants counter that a state court, in adjudicating these claims, would have to regulate the "rates charged" by a cellular provider, something a state is explicitly prohibited from doing under section 332(c)(3)(A). The defendants have the better argument.

The court in Comcast Cellular faced an issue of "rates charged" very similar to the one before us, and we find its reasoning and decision on that issue persuasive.

In Comcast Cellular, the plaintiffs alleged that a cellular provider's practice of charging in one-minute billing increments ("rounding-up") and

charging for the non-communication period from the time a call is initiated until the call is answered violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law as well as the implied covenant of good faith and fair dealing, and unjustly enriched the cellular provider, Comcast. (949 F.Supp. at p. 1196.) The plaintiffs in Comcast also alleged that Comcast inadequately disclosed ***806** these billing practices to its customers. (Ibid.)

The Comcast Cellular court concluded that the plaintiffs' claims of inadequate disclosure of these billing practices were subject to state law. (949 F.Supp. at pp. 1199-1200.) But the plaintiffs' state law claims challenging the charges for non-communication time, including the rounding-up charge, were preempted by section 332(c)(3)(A), said the Comcast Cellular court, because they posed "clear challenge[s] to the reasonableness of the rates charged by Comcast for cellular phone services." (Id. at p. 1200.)

The Comcast Cellular court reasoned as follows. The plaintiffs alleged that the non-communication charges violated the covenant of good faith and fair dealing and unjustly enriched Comcast. Thus, said the court, these allegations "direct[ly]" and "clear[ly]" challenge "the reasonableness of the rates charged by Comcast...." (949 F.Supp. at p. 1200.)

The remedies the Comcast Cellular plaintiffs sought also showed they were challenging Comcast's rates and not just the failure to disclose those rates. The court noted in this regard:

"Recovery of the amounts collected by [Comcast] through its alleged unlawful practices can be justified on the basis of nondisclosure. The injunctions demanded by the Plaintiffs do not, however, mandate disclosure or simply seek to enjoin [Comcast's] practice pending full disclosure. Rather, the Plaintiffs are seeking to permanently prevent Comcast from charging for the non-communication period. The request for such an injunction is nothing less than a request that the court regulate the manner in which Comcast calculates its rates schedules." (949 F.Supp. at p. 1201.)

The Comcast Cellular court concluded:

"[The Plaintiffs' claims] attack[ ] the reasonableness of the method by which Comcast calculates the length and, consequently, the cost of a cellular telephone call. As such, the Plaintiffs' claims present a direct challenge to the calculation of the rates charged by Comcast for cellular telephone service. The remedies they seek would require a state court to engage in regulation of the rates charged by a [cellular] provider, something [a state] is explicitly prohibited from doing [under section 332(c)(3)(A)]." (949 F.Supp. at p. 1201; see Chicago & N.W. Tr. Co. v. Kalo Brick & Tile (1981) 450 U.S. 311, 326, 101 S.Ct. 1124, 1134, 67 L.Ed.2d 258, 270-271 [state court adjudication is a form of state regulation].)

Comcast Cellular 's reasoning, which we find persuasive, can be applied to the issue before us of charging for non-communication time.

The plaintiffs have alleged in their complaint that charging for non- communication time is an "unfair" and "unlawful" business practice under California's unfair business practices law. (Bus. & Prof.Code, § 17200 et seq.) As in Comcast Cellular, this allegation "presents a clear challenge to the reasonableness of the rates charged" by the defendants. (949 F.Supp. at p. 1200.)

The plaintiffs here, like the plaintiffs in Comcast Cellular, are seeking through their request for a permanent injunction "to permanently prevent [the defendants] from charging for the non-communication period." (949 F.Supp. at p. 1201.) This request "is nothing less than a request that [we] regulate the manner in which [the defendants] calculate[ ] [their] rate schedules." (Ibid.)

The plaintiffs' claims here, like the plaintiffs' claims in Comcast Cellular, attack the reasonableness of the method by which the defendants calculate the length and, consequently, the cost of a cellular phone call. As such, the plaintiffs' claims present a direct challenge to the rates charged by the defendants for cellular phone service. (949 F.Supp. at p. 1201.)

The plaintiffs beg to differ with this analysis. As they argue, the total charge for airtime on a wireless network is made ***807** up of a rate component multiplied by a time component. It is obvious, they maintain, that the time component of the airtime charged has absolutely nothing to do with the rate

charged.

We beg to differ. As the defendants point out, this distinction between rate and time is nonsensical because the rate charged for wireless service includes both price and time. A rate for a service, like cellular phone service, that is sold based on the length of time that it is used necessarily includes a method of measuring that time, as well as a price for each unit of time used; in short, the length of time for which a customer is charged is an inseparable component of the rate. This accords with the pertinent definition of "rate": "The cost per unit of a commodity or service[;] A charge or payment calculated in relation to a particular sum or quantity ...." (The American Heritage Dictionary (2d College Ed.1982), p. 1027, italics added.) As the United States Supreme Court has put it: "Rates ... do not exist in isolation. They have meaning only when one knows the services to which they are attached." (AT & T v. Central Office Telephone (1998) 524 U.S. 214, 223, 118 S.Ct. 1956, 1963, 141 L.Ed.2d 222, 233.) In the context of cellular service, the element of time can no more be divorced from rate than a clock from its hands.

Based on this reasoning, the Federal Communications Commission (FCC) has recently concluded "that the term 'rates charged' in [section 332(c)(3)(A)] may include both rate levels and rate structures for [cellular providers] and that the states are precluded from regulating either of these." (In re Southwestern Bell Mobile Systems, Inc. F.C.C. 99-356 (November 24, 1999), ¶ 20.) The FCC has also stated that billing increments are a necessary component of the rates charged by cellular providers, and that under section 332(c)(3)(A) "states do not have authority to prohibit [cellular providers] from ... charging in whole minute increments." (In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 (1995) 10 F.C.C.R. 8844, ¶ 70, 1995 WL 1086279 (First Report); In re MCI Cellular Telephone Co. (1984) 96 F.C.C.2d 1014, 1033 [¶ 49-51, 1984 WL 251011; In re Southwestern Bell Mobile Systems, Inc., supra, F.C.C. 99-356, ¶ 23.) Finally, the FCC has interpreted the "rates charged by" language in section 332(c)(3)(A) to "prohibit states from prescribing, setting or fixing rates" of cellular providers. (In re Pittencrieff Communications, Inc. (1997) 13 F.C.C.R. 1735, 1745, ¶ 20, 1997 WL 606233; see Cellular Telecommunications Industry v. F.C.C. (D.C.Cir.1999) 168 F.3d 1332, 1336.) If states could regulate as envisioned by the plaintiffs here, those states would, at the least, be prescribing rates.

The plaintiffs' challenges here to charges for non-communication time are more directly related to "the rates charged" than the challenges found preempted under section 332(c)(3)(A) in a recent decision, Bastien v. AT & T Wireless Services, Inc. (7th Cir.2000) 205 F.3d 983. In Bastien, the plaintiff sued a new cellular provider in state court for breach of contract and consumer fraud because a high number of his calls were cut-off. (205 F.3d at p. 985.) The plaintiff basically alleged that the new cellular provider " 'signed up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular connections.' " (Id. at p. 989.) The Bastien court deemed the plaintiff's suit preempted by section 332(c)(3)(A) because it encompassed "the entry of [and] the rates charged by" the cellular provider. (Id. at pp. 984, 989.) As for "the rates charged" preemption, Bastien reasoned that "a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law." (Id. at p. 988.)

This case is not akin to those decisions that have found certain cellular or related ***808** communication charges still subject to state law. (See e.g., Esquivel v. Southwestern Bell Mobile Systems, Inc. (S.D.Tex.1996) 920 F.Supp. 713 [finding a charge for early termination of cellular service to be a "term and condition" of service, not a rate, and therefore subject to state regulation]; Co. of Ky., ex rel. Gorman v. Comcast Cable (W.D.Ky.1995) 881 F.Supp. 285 [finding the practice of billing customers for certain services unless they specifically decline them is still subject to state regulation]; Cellular Telecommunications Industry v. F.C.C., supra, 168 F.3d 1332 and Mountain Solutions v. State Corp. Com'n of Kansas (D.Kan.1997) 966 F.Supp. 1043 [state laws requiring cellular providers to contribute money to state-run universal service programs not preempted by section 332(c)(3)(A)].) The billing practices in these cases have only a tangential relationship to the actual rates for service paid by cellular customers. (See Comcast Cellular, supra, 949 F.Supp. at p. 1201.) The same cannot be said here--the plaintiffs'

claims directly challenge the way defendants calculate the length of a cellular phone call and thus the rates which are charged for such a call. (See ibid.)

[6][7] Nor does the "savings clause" in the Communications Act help the plaintiffs. That clause states that "[n]othing [contained] in this chapter [of which section 332(c)(3)(A) is a part] ... shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (47 U.S.C. § 414.) "A general 'remedies' saving clause cannot be allowed to supersede [a] specific substantive pre-emption provision"--this would render the preemption provision meaningless. (Morales v. Trans World Airlines, Inc. (1992) 504 U.S. 374, 385, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157, 168.)

And despite a lot of ink spilled on the issue by the plaintiffs, the interstate/intrastate distinction is not relevant here on "the rates charged" issue. Section 332(c)(3)(A) specifies that "no State or local government shall have any authority to regulate ... the rates charged by any commercial mobile service or any private mobile service...." (Italics added.) In amending section 332(c)(3)(A) in 1993, Congress noted that "mobile services [i.e., cellular services] ..., by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure" and that section 332(c)(3)(A) "preempt[s] state rate ... regulation of all commercial mobile services." (H.R.Rep. No. 103-111, p. 587; see also In re Petition of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates (1995) 11 F.C.C.R. 796, 1995 WL 468206 [denying California's request to extend state regulatory authority over cellular rates--see § 332, subd. (c)(3)(B).)

It is true that the court in DeCastro v. AWACS, Inc. (D.N.J.1996) 935 F.Supp. 541, in dealing with contentions involving billing for non-communication time and for rounding-up identical to those made in Comcast Cellular, stated that these contentions "challeng[e] the fairness of a billing practice, not the rates themselves." (935 F.Supp. at p. 552.) This statement, however, holds little persuasive force here. First, it was made in passing without analysis. Second, it was made in the context of considering whether section 332(c)(3)(A) "completely" preempted--rather than "ordinarily" preempted--state law, a much higher standard to satisfy. (See id. at pp. 552, 555; Sanderson, supra, 958 F.Supp. at p. 957.) And third, and most significantly, DeCastro suggested that federal law may apply, in an ordinary preemptive way, if resolution of the plaintiffs' challenges required a court to assess the reasonableness of these billing practices. (See id. at pp. 550-552, 555; see also Comcast Cellular, supra, 949 F.Supp. at p. 1200 [citing DeCastro in support of its analysis].)

In the end, the gravamen of plaintiffs' complaint, as they themselves allege, is that the defendants' actions have resulted ***809** "in subscribers, including plaintiffs, being overcharged for service." (Italics added.) From this description, it is clear that plaintiffs challenge the rates charged by defendants. If the states could still regulate in the context presented by the plaintiffs here, that would undermine the 1993 amendment to section 332(c)(3)(A), and that statute would not have "dramatically revise[d] the regulation of the wireless telecommunications industry." (Conn. Dept. of Public Utility Cont. v. F.C.C., supra, 78 F.3d at p. 845; see also Kennedy and Purcell, Section 332, 50 Federal Communications L.J. at pp. 559-562.)

We conclude that section 332(c)(3)(A) preempts the plaintiffs' claims to the extent that plaintiffs challenge the defendants' charging for non-communication time, including rounding-up, after August 7, 1995. August 7, 1995 is the pivotal date because on August 8, 1995, section 332(c)(3)(A) became effective in California after the FCC denied California's petition to retain regulatory authority over cellular rates. (§ 332, subd. (c)(3)(B) ["If a State has in effect on June 1, 1993, any regulation concerning the rates for any [cellular provider] offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the [FCC] requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition [which California did], the State's existing regulation shall, notwithstanding [the section 332(c)(3)(A) preemption provision], remain in effect until the [FCC] completes all action (including any reconsideration) on such petition. The [FCC] shall review such petition ... [and] shall complete all action (including any reconsideration) within 12 months after such petition is filed ....";

italics added]; see 47 U.S.C. § 332 Historical and Statutory Notes, "Effective and Applicability Provisions" 2000 Cumulative Annual Pocket Part, p. 199, quoting section 6002(c)(2)(A) of Public Law 103-66 [section 332(c)(3)(A) [i.e., the preemption provision] "shall take effect 1 year after ... date of enactment [date of enactment was August 10, 1993]"]; Los Angeles Cellular Telephone Co. v. Superior Court (1998) 65 Cal.App.4th 1013, 1017, fn. 3, 76 Cal.Rptr.2d 894; In re Petition of California to Retain Regulatory Authority Over Intrastate Cellular Rates, supra, 11 F.C.C.R. 796, 1995 WL 468206 (August 8, 1995) [FCC order on reconsideration denying California's request to extend state regulatory authority over cellular rates].)

[8] Plaintiffs note that their fifth and sixth causes of action (for discriminatory billing regarding ring time), their seventh cause of action (for overcharging for incomplete calls in violation of the defendants' PUC-filed tariffs and the Public Utilities Code), and their eighth and ninth causes of action (for "lag time" disconnection charges), allege unfair and unlawful business practices that began in January 1987. We agree with plaintiffs that these allegations, for conduct occurring before August 8, 1995, are not preempted by section 332(c)(3)(A) since that section's preemptive force was not in effect in California until that time.

The defendants have demurred solely on the ground of section 332(c)(3)(A) preemption. As we have seen, before August 8, 1995, California had certain regulatory powers over cellular rates. (See e.g., Pub. Util.Code, § 728; see also § 332, subd. (c)(3)(B); Los Angeles Cellular Telephone Co. v. Superior Court, supra, 65 Cal.App.4th at pp. 1017-1018, fn. 6, 76 Cal.Rptr.2d 894; In re Petition of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates, supra, 11 F.C.C.R. 796, 1995 WL 468206.) Defendants maintain that allowing plaintiffs to pursue the pre-August 8, 1995 portion of their "rate case" would *still* result in a form of preempted state rate regulation. We disagree. Again, California could regulate cellular rates in certain ways before August 8, 1995. [FN2]

> FN2. In arguing that plaintiffs' claims are preempted regardless of when the conduct complained of occurred, the defendants cite Landgraf v. USI Film Products (1994) 511 U.S. 244, 273, 114 S.Ct. 1483, 1501, 128 L.Ed.2d 229, 257 for the principle that "a court should 'apply the law in effect at the time it renders its decision[.]' " Landgraf concerned the applicability of a particular section of the Civil Rights Act of 1991. The passage in Landgraf from which defendants quote states more fully: "Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should 'apply the law in effect at the time it renders its decision[.]' " (Ibid.) Landgraf discussed the interplay of these principles, citing to a decision as an example, and concluded, "[o]ur application of 'the law in effect' at the time of [the decision] was simply a response to the language of the statute." (Ibid.) The same can be said here. We have simply applied the language of the statute, section 332, subdivision (c)(3)(B).
>
> The defendants acknowledge that plaintiffs have a federal remedy for unjust or unreasonable cellular charges, practices, classifications and regulations that occurred after August 8, 1995. (47 U.S.C. §§ 201(b), 207.)

***810** That the pre-August 8, 1995 portion of the plaintiffs' "rate case" survives the defendants' demurrer is most pointedly illustrated by the plaintiffs' seventh cause of action. In that cause of action, the plaintiffs allege that the defendants billed for charges in violation of the tariffs the defendants had to file with the PUC; this cause of action, by definition, involves conduct over which California had regulatory authority. In fact, in Los Angeles Cellular Telephone Co. v. Superior Court, supra, 65 Cal.App.4th 1013, 76 Cal.Rptr.2d 894, the lead defendant in the case before us argued successfully that a limitation on liability contained in its PUC-filed tariff applied to it; the relevant tariff in Los Angeles Cellular was filed in 1989, the relevant events occurred in 1994, and the preemptive force of section 332(c)(3)(A) was not effective until August 1995. (65 Cal.App.4th at pp. 1016-1017, fn. 3, 76 Cal.Rptr.2d 894.) What is sauce for the goose is sauce for the gander. A similar analysis applies to the plaintiffs' fifth, sixth, eighth and ninth causes of action for conduct from January 1987 through August 7, 1995. We express no views on the merit of these pre-August 8, 1995 portions of these causes of action. We simply decide that these portions are not preempted by section 332(c)(3)(A). [FN3]

> FN3. We deny the plaintiffs' first request for

judicial notice, regarding the pre-August 8, 1995 tariffs filed by certain defendants with the PUC. We have upheld against demurrer the cause of action that alleges these tariffs were violated (the seventh cause of action). Plaintiffs will now be held to their proof.

We have also denied the plaintiffs' second request for judicial notice, which encompassed many of the FCC rulings we have already discussed as well as some advertising materials of the defendants.

3. The Plaintiffs' Challenges to the Defendants' Disclosure of the Rates Being Charged

[9] The plaintiffs have also alleged that defendants concealed, inadequately disclosed or misrepresented the particular charges that plaintiffs challenge: rounding-up (second cause of action); billing from "send to end" (third and fourth causes of action); ring time for complete (connected) calls only (fifth and sixth causes of action); overcharging for incomplete calls (seventh cause of action); and "lag time" disconnection (eighth and ninth causes of action). In each of these causes of action, plaintiffs have requested generically-phrased injunctive and restitution relief that can be applied to a nondisclosure claim.

As we have alluded to previously, section 332(c)(3)(A) does not preempt a plaintiff from maintaining a state law action in state court for an alleged failure to disclose a particular rate or rate practice; section 332(c)(3)(A) only preempts a state law action challenging the reasonableness or legality of the particular rate or rate practice itself. (See Weinberg v. Sprint Corp. (D.N.J.1996) 165 F.R.D. 431, 438-439; In re Long Distance Telecommunications Litigation (6th Cir.1987) 831 F.2d 627, 633-634; DeCastro v. AWACS, Inc., supra, 935 F.Supp. at pp. 550-551; Comcas ***811** Cellular, supra, 949 F.Supp. at pp. 1199-1201; Sanderson, supra, 958 F.Supp. at pp. 955-956; Day v. AT & T Corp. (1998) 63 Cal.App.4th 325, 328-329, 336-340, 74 Cal.Rptr.2d 55; Tenore, supra, 136 Wash.2d 322, 962 P.2d 104, 107, 111-115; In re Southwestern Bell Mobile Systems, Inc., supra, F.C.C. 99-356, ¶ 23.) This is because section 332(c)(3)(A) prohibits a state from regulating "the entry of or the rates charged by" any cellular service, but allows a state to regulate "the other terms and conditions," including "customer billing information" and "other consumer protection matters." (See Tenore, supra, 962 P.2d at p. 111; see also H.R.Rep. No. 103-111, p. 588.)

Through their generically-phrased injunction requests, plaintiffs could seek either full disclosure of the challenged charges or to enjoin these charges pending full disclosure. (See Comcast Cellular, supra, 949 F.Supp. at p. 1201.) The plaintiffs' generically-phrased restitution requests could be justified on the basis of nondisclosure too, though this may be more problematic. (See ibid.; see and compare Day v. AT & T Corp., supra, 63 Cal.App.4th at pp. 336-340, 74 Cal.Rptr.2d 55, with Tenore, supra, 962 P.2d at pp. 108-115; see also In re Long Distance Telecommunications Litigation, supra, 831 F.2d at pp. 632-634.)

In any event, plaintiffs have alleged a sufficient state law basis for an action (nondisclosure as an unfair or unlawful business practice under Business & Professions Code section 17200 et seq.), and a sufficient remedy as part of that action (injunctive relief and perhaps monetary relief as well). Under our standard of review for a demurrer sustained without leave to amend, there is a reasonable possibility that plaintiffs can allege state law causes of action based on inadequate disclosure of non-communication time charges. Since section 332(c)(3)(A)'s preemptive power does not apply in this disclosure arena, the effective date of section 332(c)(3)(A) in California (August 8, 1995) is irrelevant to these causes of action.

DISPOSITION

The judgment is reversed. The plaintiffs are granted leave to amend their complaint consistent with the views expressed herein. Each side shall pay its own costs on appeal.

BLEASE, Acting P.J., and CALLAHAN, J., concur.

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